

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA

v.

CRYSTAL HARDY

and

CHRISTOPHER KELLY

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No. 1:19-cr-00250-PB

ASSENTED TO MOTION TO VACATE
CONVICTIONS AND TO DISMISS INDICTMENT WITH PREJUDICE

The United States of America, by John J. Farley, United States Attorney for the District of New Hampshire, moves to vacate the defendants' convictions and, under Rule 48(a) of the Federal Rules of Criminal Procedure, to dismiss the indictment issued in this case with prejudice. Grounds follow:

On March 5, 2021, following a jury trial, defendants Hardy and Kelly were convicted of conspiracy to distribute a controlled substance and defendant Kelly was convicted of possession of a firearm by a prohibited person. A witness, J.M., testified in the United States' case-in-chief that in and around April 2019 he witnessed a methamphetamine transaction between defendant Hardy and a known drug dealer and that he then helped both defendants package the methamphetamine for resale. In the context of the trial evidence, J.M.'s testimony was significant because it recounted events that purportedly occurred shortly after defendant Hardy was arrested on April 5, 2019, and police seized a substantial amount of cash from her. Defense counsel and counsel for the United States have recently confirmed that J.M. was incarcerated from March 4, 2019, to June 5, 2019, and accordingly could not have been present for the events he testified about occurring in April 2019.

At the time of trial, the United States was unaware that J.M. was incarcerated in April 2019 because it was not reflected in his criminal history. During the trial, the United States elicited testimony from J.M. that during 2019, he was involved in the Strafford County drug court program and that he eventually violated the conditions of the program and was incarcerated. At the time of trial, the United States was unaware that J.M. had received an intermediate sanction of incarceration from March to June for violating drug court requirements before he ultimately failed the drug court program and received an additional sanction of incarceration. Accordingly, at the time of trial, counsel for the United States did not know or appreciate that J.M.'s testimony about events he said took place in April 2019 was demonstrably incorrect.

Counsel for the United States recently determined through other information that the events J.M. testified about likely occurred in summer of 2019 after he was released from custody. Based on this, it is likely J.M. was mistaken about the time frame of the events he testified about, but his testimony was not perjurious. Nevertheless, his testimony, which was central to the United States' case, was misleading and it is reasonably likely that it affected the jury's judgment.

Under these circumstances, the United States concedes that due process requires that the jury's verdicts be vacated. *Cf. Shih Wei Su v. Fillion*, 335 F.3d 119, 126-27 (2d Cir. 2003) (in a habeas action, to challenge a conviction based on false evidence a petitioner must establish (1) false testimony was introduced; (2) the prosecutor knew or should have known that the testimony was false; (3) the false testimony went uncorrected; and (4) there was a reasonable likelihood that the false testimony could have affected the judgment of the jury.)

The United States has determined that in the absence of J.M.'s testimony it will not seek to retry the defendants and moves to dismiss the indictment with prejudice.

Defendant Christopher Kelly, through his counsel, Donna Brown, Esq., and defendant Crystal Hardy, through her counsel, Jaye L. Rancourt, Esq., assent to this motion.

A supporting memorandum of law has not been filed because relevant authority is cited herein.

Respectfully submitted,

JOHN J. FARLEY
United States Attorney

Dated: January 11, 2022

By: /s/ Debra M. Walsh
Debra M. Walsh
NY Bar No. 2369627
Aaron G. Gingrande
MA Bar No. 688340
Assistant U.S. Attorneys
53 Pleasant Street, 4th Floor
Concord, New Hampshire 03301
(603) 225-1552
deb.walsh@usdoj.gov